EXPRESS MAIL

APR 13 1988

White

Ben B. Hardy, Esquire
Hardy & Hardy
209 South Fifth Street
Suite 400
Louisville, Kentucky 40202

RE: Lee's Lane Landfill Site
Louisville, Kentucky

Dear Mr. Hardy:

This letter is in response to your letter to me, dated March 21, 1988. In your letter you made several comments which I wish to address.

First, you stated that you had submitted a proposal to the group of settling potentially responsible parties (PRPs) concerning your participation in the settlement. It is my understanding that you also submitted an offer to pay a certain sum of money and that the PRP group rejected that offer as being too low.

Second, you indicated that you have little experience with or knowledge about the Superfund cost recovery process, and in particular, with the "process of determination of liability regarding the percentages that should be paid or in prior practice have been required to be paid by owners, operators, carriers or any others that might be brought into the picture." There are no statutory, regulatory or EPA policy requirements or established guidelines, practices or procedures as to what percentages of EPA's costs should be paid by the various categories of PRPs, or, as to whether one category of PRPs should be held legally more liable that any other category of PRPs. As I explained in my previous letter to you, the law is well-settled that liability under CERCLA for EPA's response costs is joint and several, meaning that EPA can sue one or more of the PRPs at Lee's Lane for all its costs without making a determination of who is legally more responsible. Applying the principle of joint and several liability to the Lee's Lane Site means that EPA could sue the owners and operators only, for 100% of EPA's costs.

Generally, the allocation of responsibility at a Superfund site is determined by the PRPs themselves, occasionally with some input or recommendations from EPA. The most common method for determining an allocation at a site with multiple PRPs (generators and transporters) is to rank PRPs according to the volume and/or toxicity of the wastes contributed to the Site by each PRP. The allocation is more easily facilitated if there are sufficient records such as invoices, shipping records, ledgers and other operational records. If such records are obtained by EPA, EPA usually prepares a ranking of PRPs in terms of whatever information is available (i.e., volume, toxicity, dollar amount of transactions). Some of the rankings also might indicate the type of hazardous substances sent to the Site by each PRP. As you would expect, usually the owner and operator of a Site does not appear on the ranking unless they also were a generator or transporter and contributed hazardous substances to the Site. In some instances, the PRPs will prepare their own ranking in addition to EPA's ranking and will base their allocation of responsibility on one or both rankings. Once a ranking is available to the PRPs, EPA's preference is to let the PRPs devise their own apportionment scheme for all PRPs, including the owners and operators. If the PRPs encounter difficulties in devising a formula which is acceptable to a majority of the PRPs, or if the formula is patently unfair to one or more PRPs, and such failure to reach an internal accord among the PRPs is impeding a "global" settlement with EPA, EPA then will take a more active role in the allocation process. Given the developments in the negotiations in the Lee's Lane matter, EPA has determined that it should now take a more active role.

Recently, EPA has formulated a policy which recognizes that owners who purchased the Site without knowledge that the Site had been used to dispose of, or manage, store or treat wastes, generally will not be held legally responsible for EPA' response costs. Obviously, this "innocent" landowner defense does not apply to the owners of Lee's Lane Landfill who operated the Site or may have allowed others to operate the Site. There is no question but that The Hofgesang Foundation, Inc., and J.H. Realty (as successor to Jos. C. Hofgesang Sand Co.), are responsible parties under Section 107(a) of CERCLA, 42 U.S.C. Section 9607(a), and are liable for EPA's response costs. EPA's position is that Hofgesang, J.H. Realty and possibly yourself, individually, as owners and operators of the Site which was operated as a private business for profit, should pay 25% of EPA's costs (approximately $675,000). The remaining 75% should be paid by the generators and transporters. In fact, EPA may agree to settle this matter with the group of participating PRPs for approximately $2 million and to vigorously pursue judgment against Hofgesang, J.H. Realty and yourself for the remaining $700,000-$800,000 of EPA's costs.

EPA strongly recommends that you agree to settle this matter on the terms outlined herein. You are also encouraged to contact Mr. Harrison to discuss this matter. Please advise me in writing by

April 20, 1988 whether you will agree to settle your liability to EPA by contributing 25% of EPA's costs. If I do not hear from you or if you refuse to settle this matter on terms acceptable to EPA, I will request the United States Department of Justice and the United States Attorney to proceed with cost recovery litigation against Hofgesang, J.H. Realty and yourself in U.S. District Court.

Sincerely,

Robert W. Caplan
Assistant Regional Counsel
Hazardous Waste Law Branch

cc: Tom Harrison
Lawrence Zielke

bcc: Anita Davis
Beverly Spagg
Bill Steiner
Larry Groner, OECM
Walker Smith, DOJ

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